Petition

No.

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81-1376 In The

Supreme Court of the United States

October Term, 1981

400 E. BALTIMORE STREET, INC.,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CRIMINAL COURT OF BALTIMORE CITY

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QUESTIONS PRESENTED

1. May a trial court, consistent with due process requirements and equal protection of the laws guaranteed under the Fifth and Fourteenth Amendments, deny a motion for judgment of acquittal when there is *no evidence* as to the *elements* of the crime charged.

2. May a trial court, consistent with due process and equal protection of the laws guaranteed under the Fifth and Fourteenth Amendments, allow a case to be considered by a jury when there is *no evidence*.

3. May a trial court deny a defendant due process of law and equal protection in an appeal *de novo* by refusing to entertain a motion to dismiss and a motion to suppress and a suppression hearing when the local rules require that "an appeal shall be heard on the original papers."

4. May a trial court, consistent with due process of law deny a motion for judgment of acquittal and allow a jury to consider a case when there is a fatal variance between the *allegata* and the *probata*.

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No.

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400 E. BALTIMORE STREET, INC.,

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STATE OF MARYLAND,

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PETITION FOR WRIT OF CERTIORARI TO THE CRIMINAL COURT OF BALTIMORE CITY

OPINION BELOW

The petitioner was found guilty in a trial *de novo* before a jury with the Honorable Solomon Baylor presiding on the 10th day of August, 1981 of the violation of Md. Ann. Code Art. 66A §19(b). The jury found that the petitioner was guilty as to 151 separate counts under the Article and Judge Baylor imposed a fine of fifty dollars ($50) per film, plus court costs at disposition on the 10th day of September, 1981. It is from that conviction

that the petitioner filed a timely petition for writ of certiorari to the Court of Appeals of Maryland. The writ of certiorari was denied on the 23rd of November, 1981 and the petitioner seeks review by this Honorable Court.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on November 23, 1981 and the judgment was thus final. Jurisdiction of this Court is invoked under Title 28, U.S.C.A. Section 1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, the following statutory provisions are relevant:

Article 66A, Section 19(b) of the Annotated Code of Maryland provides:

> "(b) Any person who shall sell, lease, lend, exhibit or use any film without having first secured approval thereof and a license therefore in accordance with the procedures set forth in subsection (a) above, shall be guilty of a misdemeanor and upon conviction summarily before a court, shall be sentenced to pay a fine of not less than fifty ($50.00) dollars, nor more than one hundred ($100) dollars, or to imprisonment for not more than thirty (30) days, or to be both fined and imprisoned in the discretion of the court."

Article 66A, Section 22 states:

> "If any person shall fail to display or exhibit on the screen the approval seal, as issued by the Board, of a film or view, which has been approved, and is convicted summarily in any court of competent jurisdiction, he shall be sentenced to pay a fine of not less than five dollars and not more than ten dollars. All fines and costs shall be paid in accordance with Article 38 §4 (Ann. Code, 1951; §22; 1939, §22, 1924, §22, 1922, ch. 390, §21; 1972, ch. 181, §58."

Article 66A, Section 2:

> "It shall be unlawful to sell, lease, lend, exhibit or use any motion picture films or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors. . ."

Maryland Rule 736(b):

> "A motion filed pursuant to section a of this Rule shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the Court pursuant to Rule 723 (Appearance - Provision for or Waiver of Counsel), except when discovery is furnished on an issue which is the subject of the motion, then the motion may be filed within five days after the discovery is furnished."

United States Constitution, Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner and its employees were arrested for violating Article 66A on the 6th day of October, 1978. They were prosecuted in the District Court of Maryland for violating Article 66A, Section

19(b) and the statements of charges charged the petitioner as follows:

> "1. Did exhibit motion picture film . . . for hire to the public on above premises without showing proper approval or a statement of license for the showing of said film having been obtained from the Md. St. Board of Censors in Baltimore City.
>
> 2. _____did exhibit motion picture file_____did hire to the public on the premises of_____without showing approval or a statement of license."

The employees were found not guilty by Judge Ciotola, but the petitioner was found guilty of violating Article 66A, Section 19(b) in connection with 151 films seized by police officers and fined the maximum of $100 per film. An appeal was taken to the Criminal Court of Baltimore City and a trial *de novo* began before a jury with the Honorable Solomon Baylor presiding on the 10th day of August, 1981.

At the original trial in the District Court of Maryland before Judge Ciotola, petitioner had filed a motion to dismiss and motion to suppress. Petitioner renewed its motion to dismiss and suppress with the intention of proceeding on the original pleadings filed in the District Court. The State objected on the ground that Rule 736 was applicable and Judge Baylor denied petitioner the right to argue a motion to suppress, a suppression hearing and argument on the motion to dismiss, other than on constitutional issues.

The State's evidence was based on the seizure of 151 films, three of which had been viewed by the police officers who testified that when they activated the projectors in the peep show booths, they saw no Censor Board seal displayed on the screen. At the

time, the 151 films were in the process of being seized, the police testified that no one viewed any of the films at the time of the seizure or immediately prior thereto. During the course of the seizure, the police testified that they saw the red light lit on maybe two or three of the booths, indicating to them that someone had activated the projector and from that, they assumed there was a film being exhibited in that booth. As to the remaining 147 films, there was no testimony or evidence presented by the State, that the petitioner was the lessee, owner or exchange of the films seized or that the 147 films had been exhibited. Also, there was no testimony or evidence presented by the State as to the intent of scienter on the part of the petitioner as to having knowledge that the films were never submitted for approval.

At the conclusion of the State's case, petitioner moved for a judgment of acquittal on the following grounds:

1. There was variance between the proof and allegations on the charging document;

2. The State never proved scienter on the part of the petitioner;

3. There was *no* evidence circumstantial or otherwise as to an exhibition of approximately 147 films which is an essential item that must be proved for violation of Article 66A, Section 19(b) in view of the fact that petitioner was charged with exhibition and nothing else;

4. The State never proved that petitioner was the lessee, owner or exchange of the film alleged to have been exhibited in violation of the law. The motion was denied. The motion was renewed at the conclusion of all of the evidence, and again denied. The jury returned a verdict of guilty as to each and every one of the 151 films.

On the 19th day of August, 1981, a motion for new trial was filed. On the 10th day of September, 1981, a hearing in open court was held on this motion for new trial, with Judge Solomon Baylor again presiding. On that day, the motion was denied and the Petitioner was fined $50 per films plus costs.

HOW THE FEDERAL QUESTIONS WERE RAISED

The petitioner raised the issues of the constitutionality of the procedures under which they were tried by way of motions for judgment of acquittal in the Criminal Court of Baltimore City wherein they argued that it was violative of due process and equal protection of the law for the trial court to permit the case to be submitted to the jury where the State failed to present evidence as to an essential element of the offense charged in addition to the variance between the charge against the petitioner and the proof.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the constitutional guarantees of equal protection of the laws and due process of law required in conducting a criminal jury trial, mandated by this Honorable Court in order to avoid conflict in decisions.

2. The flagrant violation by the trial court of the constitutional guarantees of trial by an impartial jury, equal protection of the laws and due process of law in conducting a jury trial suggests the propriety of review by this Court.

I.

A trial court cannot deny to a defendant due process of law and equal protection in an appeal *de novo* by refusing to entertain a motion to dismiss, a motion to suppress and a suppression hearing when the local rules require that "an appeal shall be heard on the original papers".

At trial, the petitioner presented a motion to suppress and a motion to dismiss. The State objected pursuant to Rule 736(b) which states:

> "A motion filed pursuant to section A of this Rule shall be filed within 30 days after the earlier of the appearance of counsel of the first appearance of the defendant before the court pursuant to Rule 723 (Appearance — Provision for or Waiver of Counsel), except when discovery is furnished on an issue which is the subject of the motion, then the motion may be filed within five days after the discovery is furnished."

The State's objection was premised upon the contention that the petitioner had failed to file any motions at all and had failed to raise the motion in a timely manner. The trial judge denied petitioner the right to argue the motion to suppress, a suppression hearing and a motion to dismiss other than on constitutional issues.

Maryland District Rule 1326(c) states that "an appeal shall be heard on the original papers". Section (d) of that rule states that "all the original papers filed in the action in lower court, except such papers as the parties may stipulate shall be omitted, shall constitute the record on appeal".

In *Pinkett v. State,* 30 Md. App. 458, 352 A. 2d 358 (1976), the Court of Special Appeals of Maryland, in holding that the defendant was required to be tried in the Circuit Court under the same statement of charges and arrest warrant which had led to his conviction in the District Court, stated:

> "Md. Rule 1314a, concerning appeals from the District Court, declares: 'Where an appeal is to be heard de novo, it shall be tried according to the rules of procedure governing cases instituted in the appellate court . . .' " At 365.

> "If the trial in the Circuit Court is not upon the same charging document as was the trial in the District Court, the trial in the Circuit Court would be an original trial, not a trial anew, afresh or again, so as to be a trial de novo." At 365.

The petitioner in the case at bar had elected a trial *de novo.* It is inconsistent to require that the new motions be filed when an appeal is taken although additional written motions were filed by petitioner during the trial in the Criminal Court.

The trial record from the District Court clearly establishes that petitioner, through counsel, presented a motion to suppress and motion to dismiss, despite the State's conflicting contention that no such motions were ever filed by the petitioner, and upon learning the erroneous nature of that contention, that the motions were not timely filed.

The petitioner contends that it has compiled with the "spirit" of Rule 736, *et seq.,* by the renewal of its motions before the Criminal Court when the appeal was taken.

The State's contention that the motions were not timely made is contrary to the principles of fairness and equity to which the petitioner is entitled. Rule 736(b) requires that motions be filed "within 30 days after the earlier of appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 723 . . ." In the instant case, the earlier proposition is the first appearance of the petitioner in the District Court approximately two years prior to the time of the appeal to the Criminal Court. Under this construction, it is impossible for the petitioner to file motions under Rule 736(b) when an appeal has been taken.

Therefore, petitioner respectfully contends that the original motions filed in the District Court proceedings and the renewed motions submitted to the Criminal Court are an integral part of the "original papers" which constitutes the appeal, and that the legal issues raised therein must be considered by the Criminal Court which is the appellate court in the instant case. Petitioner has complied with the "spirit" of Rule 736, *et seq.*, if it is applicable to a trial *de novo* on appeal from the District Court. Therefore, the lower court's refusal to allow a motion to dismiss from being argued, a suppression hearing and argument on the motion to suppress was an abuse of discretion and a denial of due process and equal protection of the law.

II.

It is inconsistent with due process requirements and equal protection of the laws guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution for a trial court to deny a motion for a judgment of acquittal when there is no evidence as to the elements of the crime charged.

The statements of charges issued in the case at bar charge violations of Md. Ann. Code 66A Section 19(b) which states:

> "(b) any persons who shall sell, lease, lend, exhibit or use any film without having first secured approval thereof and a license therefor in accordance with the procedures set forth in subsection (a) above, shall be guilty of a misdemeanor and upon conviction summarily before a court, shall be sentenced to pay a fine of not less than fifty ($50.00) dollars, nor more than one hundred ($100.00) dollars, or to imprisonment for not more than thirty (30) days or to be both fined and imprisoned in the discretion of the Court."

Clearly, from the face of the statute, a necessary element to be established is that a film was sold, leased, lent or *exhibited* (emphasis supplied); and that the film was not submitted for approval to the Maryland State Board of Censors. The statements of charges issued by the police officers specifically charged the petitioner with the "exhibition" of film which failed to display the approval seal of the "Board". Therefore, there is no issue as to the sale, lease or lend of film under §19(b); only *exhibition* was charged as a violation of the statute.

Md. Ann. Code Article 66A, §2 specifies that:

> "It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors. . . ."

Section 2 clearly places the responsibility and the obligation of the submission of film to the Board on the "*exchange, owner or lessee of the film.*" (emphasis supplied).

The Maryland statute is intended to be construed consistently and as a whole. In *Thomas v. State,* 353 A. 2d 256 (1976), the Court of Appeals of Maryland remarked:

> "We have said many times that a hornbook rule of statutory construction is that in ascertaining the intention of the Legislature all parts of a statute are to be read together to find the intention as to any one part and that all parts are to be reconciled and harmonized if possible and that a corollary to that rule is that if there is no clear indication to the contrary and it is reasonably possible, a statute is to be read so that no word, clause, sentence or phrase shall be rendered surplusage, superfluous, meaningless or nugatory. See e.g. Kadan v. Bd. of Supp. of Elections, 273 Md. 406, 415, 329 A. 2d 702 (1974); A.H. Smith Sand and Gravel v. Dep't., 270 Md. 652, 659, 313 A. 2d 820 (1974)."

In *Fowel v. State,* 11 A. 2d 524 (1955), the Court of Appeals of Maryland refused to affirm the appellant's conviction for the violation of the Maryland liquor law for dispensing liquor under proscribed conditions. The court found that the words "any person" found in the last sentences of several sections of the statute referred exclusively to the "licensee" as defined and used throughout the statute. The court concluded that:

> "If the Legislature had intended that the words 'any person' used in the last sentences of Sections 118 and 93, supra, meant any clerks, agents, employees and servants of the licensee, it could have inserted such words in the statute." *Fowel v. State, supra,* at 526.

Petitioner contends that under the doctrine of *Thomas, supra,* and *Fowel, supra,* the words "any person" as used in Section 19(b) refers exclusively to the "exchange, owner or lessee" of the film as established in Section 2 of the Article. The statutory language of Section 19(b), "any person who shall sell, lease, lend, exhibit or use any film *without having first secured approval thereof* . . ." (emphasis supplied) restricts the construction of the words "any person" to those specifically enumerated in Section 2; *i.e.,* the "exchange, owner or lessee" as these only are responsible for the submission of the film to the Board.

In the case at bar, the State has failed to offer evidence which would establish that the petitioner is the "exchange, owner or lessee" of the films in question. The petitioner further contends that absent such a determination, as a matter of law, the petitioner cannot be prosecuted for the violation of Md. Ann. Code Art. 66A §19(b) and therefore that any conviction is a denial of due process and equal protection of the law under the Fifth and Fourteenth Amendments to the Constitution of the United States.

This proposition was supported in *Harrington v. State,* 17 Md. App. 157 (1973) in which the Court of Appeals of Maryland reversed a Md. Ann. Code Art. 66A §2 conviction on the ground that it was never established that "Harrington, either individually or in a corporation capacity, was the 'exchange, owner or lessee' of the film that was exhibited in violation of Section 2." at 165.

In the case at bar, the State has, at best, only inferred that the petitioner is the "exchange, owner or lessee" of the film seized. This unsupported inference is insufficient to support a conviction. In *Davidson v. Miller,* 276 Md. 54, 344 A. 2d 422 (1975), the Court of Appeals of Maryland stated, in references drawn from evidence:

> "in matters of proof, neither the Courts nor the juries are justified in inferring from mere possibilities the existence of facts, and they cannot make mere conjecture or speculation the foundation of their verdicts." at 427.

Citing from *Craig v. State,* 14 Md. App. 515, 287 A. 2d 300 (1971), the *Harrington* court, *supra,* stated:

> "We think that the finger of suspicion may well point toward the appellant, but suspicion is not the basis upon which a conviction may be predicated. There must be evidence which, if believed, either shows directly or supports a rational inference of the facts to be proved, from which the court could fairly be convinced, beyond a reasonable doubt, of the defendant's guilt."

In the case at bar, the petitioner contends that because no evidence was presented to establish a legal link between it and the films seized, there is no rational inference which can be drawn to establish guilt beyond a reasonable doubt.

The second major contention of the petitioner is that, as a matter of law, scienter must be proven by the State beyond a reasonable doubt that the petitioner knew the films had not been submitted to the Maryland State Board of Censors and did not bear the required seal.

In *Star v. Preller,* 352 F. Supp. 530 (1972), the United States District Court for Maryland held that in a Md. Ann. Code Art. 66A §19(b) prosecution, due to the First Amendment context, "the state cannot eliminate the element of scienter and impose strict liability in a criminal prosecution." The court went on to state:

> "Thus, while we have been unable to find a reported Maryland decision on this issue, it is clear that defendant would be able to raise the defense of a lack of scienter in a criminal prosecution under §19(b), and that the State would have to prove this element in order to sustain a conviction." *Supra* at 539.

The petitioner has raised the defense of lack of scienter and that the State has failed to offer any rebuttal evidence on this issue. Under the doctrine of *Star, supra,* the State has failed to meet its burden of proof in establishing the elements of the crime charged. Such conduct results in an impermissible denial of the protections guaranteed the petitioner under the United States Constitution.

The petitioner's third contention is that the State has failed to offer any evidence, circumstantial or otherwise, to establish that, as to approximately 147 films, *there was ever an exhibition, an essential element of the offense.* There was no evidence or testimony presented at trial to establish or infer that an exhibition of these films occurred. The testimony at trial reveals that the police viewed only three of the films and that during the seizure of the films, the police noticed the red occupancy lights on approximately two or three projection booths. No direct evidence as to an exhibition of any other film was presented at trial. Therefore, the evidence, direct and circumstantial, indicates that only six or seven films were or may have been exhibited. The petitioner was charged with exhibition and the majority of the films seized, approximately 147, for which the petitioner was convicted of exhibiting in violation of Md. Ann. Code Art. 66A §19(b), were never established as having been *exhibited* (emphasis added). The total lack of evidence as to the *exhibition* (emphasis added) of these films indicates that proof as to the *exhibition* (emphasis added) beyond a reasonable doubt is nonexistent.

The State is merely inferring that film was in each and every projector. The State has assumed that film was in each projector; that each coin-operated projection system was in operational mechanical order; and that a customer, at some point in time, viewed at least a portion of each of these 147 films. At trial, no evidence was proffered by the State to support or prove these assumptions.

The law is well established in Maryland that an appellate court may review the sufficiency of evidence which was submitted to the jury in a criminal prosecution when a motion for judgment of acquittal is made pursuant to Maryland Rule 755. *State v. Devers,* 260 Md. 360, 272 A. 2d 794 (1971); *Vuitch v. State,* 10 Md. App. 389, 271 A. 2d 371 (1971).

The cases dealing with this issue consistently hold that *some* evidence must be presented to support a rational inference of the facts to be proved. *See Hines v. State,* 34 Md. App. 612, 368 A. 2d 509 (1977); *Devers, supra.*

In each of the above-cited cases, the appellate court evaluated the evidence submitted at trial to ascertain whether the evidence met the standards in *Devers.* In each case, however, *some* evidence had been submitted at trial to establish the required elements of the offense charged.

The petitioner therefore contends that the State has failed to meet its burden by its failure to present any evidence at all of the actual exhibition of the films which constitutes the essential element of the offense charged. Further, no reasonable inference as to the occurrence of an exhibition can be made and that, as a matter of law, the case could not have been presented to the jury without supporting evidence.

Permitting the case to go to the jury with no evidence which would establish the elements of the offense charged, is a flagrant violation by the trial court of the constitutional guarantees of equal protection of the laws and due process of the law.

III.

It is inconsistent with due process requirements and equal protection of the laws guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution for a trial court to allow a case to be considered by a jury when there is no evidence. It is also inconsistent with due process requirements to deny a motion for judgment of acquittal and allow a jury to consider a case when there is a fatal variance between the *allegata* and the *probata*.

The petitioner was charged and convicted of exhibiting films which failed to display the seal of approval of the Maryland State Board of Censors under Md. Ann. Code Art. 66A §19(b). At trial, the State failed to proffer any evidence whatsoever that an exhibition actually occurred as to approximately 147 of the total 151 films seized. The police officers established that there were no approval seals displayed on the films they viewed personally. It is clear from the *face of the statute* and the *charging documents, that proof of exhibition* is an essential element to sustain the petitioner's conviction under Section 19(b) of the statute.

In *Benjamin v. State,* 9 Md. App. 373 at 375 (1970), the Court of Special Appeals stated: "It is, of course, well settled that the evidence in a criminal *case must not vary from those allegations in the indictment* which are essential and material as to the offense charged. *Melia and Shelhorse v. State,* 5 Md. App. 354 at 363 (1978).

The Maryland Court of Special Appeals in *Baker v. State,* 6 Md. App. 148, 250 A. 2d 677 (1969), stated as follows:

> "[An] indictment charging an offense denounced and defined by statute should be as full descriptive of the offense as is the language of the statute, and should allege every substantial element of an offense as defined by statute without material diversion or departure from fair intendment of terms of statute and with reasonable particularity of time, place and circumstances."

See also, Hamling v. State, 418 U.S. 87 (1974); *Mason v. State,* 12 Md. App. 655, 280 A. 2d 753 (1971).

The petitioner argues that it was not put on notice as to the nature of the charges against it. The wording appearing in the stamped violations, as cited above, more closely, although not exactly, follows the statutory language contained in Md. Ann. Code Art. 66A Sec. 22 than that contained in Section 19(b).

The petitioner contends that such a fatal and material variance between the *allegata* and the *probata* in fact exists in the case at bar.

The evidence presented at trial established that the police officers observed no seal of approval from the Maryland State Board of Censors on the three films which they personally viewed. The police further noted that no such seal appeared on any of the film seized.

Md. Ann. Code Art. 66A, §22 establishes that:

> "If any person shall fail to display or exhibit on the screen the approval seal, as issued by the Board, of a film or view, which has been approved, and

> is convicted summarily in any court of competent jurisdiction, he shall be sentenced to pay a fine of not less than five dollars and not more than ten dollars. All fines and costs shall be paid in accordance with Article 38, §4. (Ann. Code, 1951, §22; 1939, §22; 1924, §22; 1922, ch. 39, §21; 1972, ch. 181, §58)."

The statute clearly requires that the approval seal from the Censor Board be displayed on all films or view as proof of the submission and approval of the film by the Board.

The evidence presented at trial is insufficient to establish a violation of Section 19(b) which requires proof of *exhibition*, but is only sufficient to establish a violation of Section 22, which requires only the failure to display the board-approval seal on the film.

In *Baker v. State,* 6 Md. App. 148, 250 A. 2d 677 (1969), the Court of Special Appeals stated at 157, 250 A. 2d at 683:

> "When the offense is sufficiently particularized, it is not necessary to specify the exact section of the statute or to set forth the law which is alleged to have been violated. But there must be such specification of language as to bring the charge within the particular portion of the statute on which it is based . . . ."

Kirsner v. State, 24 Md. App. 579, 332 A. 2d 708 (1975).

In the case at bar, the charging documents specified that *exhibition* was being charged under Section 19(b) of the Article, thereby establishing the *allegata.* However, the failure of the State to offer evidence as to the essential element of exhibition and

the existence of Section 22 of the Article illustrates the fatal variance as to the *probata* establishes a violation of Section 22.

Therefore, there exists a fatal and material variance between the *allegata*, which specifically charges *exhibition* in violation of Md. Ann Code Art. 66A §19(b), and the *probata,* which is clearly insufficient to establish the occurrence of the essential element of *exhibition* but which does establish the failure to display the approval seal of the Maryland State Board of Censors in violation of Md. Ann. Code. Art. 66A, §22.

The result of the petitioner's conviction is, therefore, a denial of due process under the Fourteenth Amendment to the Constitution of the United States. Under the theories of jurisprudence of *Benjamin, supra* and *Melia, supra,* petitioner is entitled to a reversal of the conviction.

CONCLUSION

For the reasons herein stated, the petitioner respectfully requests that this Court issue a writ of certiorari to review the decision of the Criminal Court of Baltimore City to determine the important constitutional issues created as a result of the decision. It is further respectfully suggested that the decision of the court below is in conflict with constitutional guarantees of the United States Constitution.

Respectfully submitted,

BURTON W. SANDLER
Attorney for Petitioner

Appendix

APPENDIX

PETITION FOR WRIT OF CERTIORARI TO THE CRIMINAL COURT OF BALTIMORE

IN THE COURT OF APPEALS OF MARYLAND

Misc. No.

September Term, 1981

400 E. BALTIMORE STREET, INC.

Petitioner

vs.

STATE OF MARYLAND

Respondent

400 E. Baltimore Street, Inc., Petitioner, by its attorney, Burton W. Sandler, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Criminal Court of Baltimore City in the case of *400 E. Baltimore Street, Inc. v. State of Maryland* (September Term, 1981).

OPINION BELOW

The Appellant was found guilty in a trial de novo before a jury with the Honorable Solomon Baylor presiding on the 10th day of August, 1981 of the violation of Md. Ann. Code Art. 66A, §19(b). The jury found that the Appellant was guilty as to 151 separate counts under the Article and Judge Baylor imposed a fine of fifty dollars ($50.00) per film, plus Court costs at

disposition on the 10th day of September, 1981. It is from this conviction that the Appellant seeks review by this Honorable Court.

JURISDICTION

The jurisdiction of this Court is invoked under Section 12-203 of the Courts and Judicial Proceedings Article and is within the time limits of Rule 812(c) of the Maryland Rules of Procedure.

QUESTIONS PRESENTED FOR REVIEW

I. Is Maryland Rule 736 inapplicable to an appeal taken from a District Court when a trial de novo is elected.

II. Did the Court's refusal to grant Appellant's Motions for Judgment of Acquittal constitute reversible error and a denial of due process and equal protection of the laws under the *Fifth and Fourteenth Amendments* to the *United States Constitution.*

III. Is a Defendant denied due process of law and equal protection of law when a jury is allowed to consider a case with *no evidence at all.*

IV. Was the Court's refusal to grant Appellant's Motion for New Trial an abuse of discretion and a denial of due process and the right to a fair and impartial trial under the *Sixth* and *Fourteenth Amendments* to the *United States Constitution.*

V. Was the Court's refusal to grant Appellant's Motion for Mistrial an abuse of discretion and a denial of due process and the right to a fair and impartial trial under the *Sixth* and *Fourteenth Amendments* to the *United States Constitution.*

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STATEMENT OF THE CASE

Appellant and its employees were arrested for violating Article 66A on the 4th day of October, 1978. They were prosecuted in the District Court of Maryland for violating Article 66A, Section 19(b), and the Statements of Charges charged the Appellant as follows:

> "1. Did exhibit motion picture film . . . for hire to the public on above premises without showing proper approval or a statement of license for the showing of said film having been obtained from the Md. St. Board of Censors in Baltimore City."
>
> "2. _____ did exhibit motion picture film _____ did hire to the public on the premises of _____ without showing approval or a statement of license."

The employees were found not guilty by Judge Ciotola, but the Appellant was found guilty of violating Article 66A, Section 19(b) in connection with 151 films seized by police officers and fined the maximum of $100 per film. An appeal was taken to the Criminal Court of Baltimore City and trial de novo began before a jury with the Honorable Solomon Baylor presiding on the 10th day of August, 1981.

At the original trial in the District Court of Maryland before Judge Ciotola, Appellant had filed a Motion to Dismiss and Motion to Suppress. Appellant renewed its Motion to Dismiss and Suppress with the intention of proceeding on the original pleadings filed in the District Court. The State objected on the ground that Rule 736 was applicable and Judge Baylor denied

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Appellant the right to argue a Motion to Suppress, a suppression hearing, and argument on the Motion to Dismiss, other than on constitutional issues.

During the course of the trial, one of the jurors who had not acknowledged knowing Mary Avara, one of the State's key witnesses, on the voir dire, was talking to the witness in the presence of police officers and other jurors in the courthouse elevator and the Trial Court refused to grant mistrial or new trial.

The State's evidence was based on the seizure of 151 films, three of which had been viewed by the police officers who testified that when they activated the projectors in the peep show booths, they saw no Censor Board seal displayed on the screen. At the time, the 151 films were in the process of being seized, the police testified that no one viewed any of the films at the time of the seizure of immediately prior thereto. During the course of the seizure, the police testified that they saw the red light lit on maybe two or three of the booths, indicating to them that someone had activated the projector and from that, they assumed there was a film being exhibited in that booth. As to the remaining 147 films, there was no testimony or evidence presented by the State, that the Appellant was the lessee, owner or exchange of the films seized or that the 147 films had been exhibited. Also, there was no testimony or evidence presented by the State as to the intent or scienter on the part of the Appellant as to having knowledge that the films were never submitted for approval.

During the course of the trial, direct examination of the State's witness, Mary Avara, she was allowed to inject the issue of obscenity into the case and a Motion for Mistrial was denied.

At the conclusion of the State case, Appellant moved for a Judgment of Acquittal on the following grounds:

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1. That there was variance between the proof and the allegations on the charging document.

2. That the State never proved scienter on the part of the Appellant.

3. That there was *no* evidence circumstantial or otherwise as to an exhibition of approximately 147 films which is an essential item that must be proved for violation of Article 66A, Section 19(b) in view of the fact that Appellant was charged with exhibition and nothing else.

4. That the State never proved that Appellant was the lessee, owner or exchange of the film alleged to have been exhibited in violation of the law. The motion was denied. The motion was renewed at the conclusion of all of the evidence, and again denied. The jury returned a verdict of guilty as to each and every one of the 151 films.

On the 19th day of August, 1981, a Motion for New Trial was filed. On the 10th day of September, 1981, a hearing in open court was held on this Motion for New Trial, with Judge Solomon Baylor again presiding. On that day, the Motion was denied and the Appellant was fined $50 per film plus Court costs.

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

In addition to the *Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *United States Constitution,* the following statutory provisions are relevant:

Article 66A, Section 19(b) of the Annotated Code of Maryland provides:

"(b) Any person who shall sell, lease, lend, exhibit or use any film without having first secured approval thereof and a license therefor in accordance with the procedures set forth in subsection (a) above, shall be guilty of a misdemeanor and upon conviction summarily before a court, shall be sentenced to pay a fine of not less than fifty ($50.00) dollars, nor more than one hundred ($100.00) dollars, or to imprisonment for not more than thirty (30) days, or to be both fined and imprisoned in the discretion of the court."

Article 66A, Section 22 states:

"If any person shall fail to display or exhibit on the screen the approval seal, as issued by the Board, of a film or view, which has been approved, and is convicted summarily in any court of competent jurisdiction, he shall be sentenced to pay a fine of not less than five dollars and not more than ten dollars. All fines and costs shall be paid in accordance with Article 38 §§ (An. Code, 1951; §22; 1939, §22; 1924, §22; 1922, ch. 390, §21; 1972, ch. 181, §58)."

Article 66A, Section 2:

"It shall be unlawful to sell, lease, lend, exhibit or use any motion picture films or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors. . . ."

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Maryland Rule 736(b):

> "A motion filed pursuant to section a of this Rule shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the Court pursuant to Rule 723 (Appearance — Provision for or Waiver of Counsel), except when discovery is furnished on an issue which is the subject of the motion, then the motion may be filed within five days after the discovery is furnished."

REASONS FOR CERTIORARI

1. It is necessary to secure uniformity of decisions between existing cases as to whether a Trial Court must proceed on the original pleadings in a trial de novo from a District Court appeal as required under the statute.

2. Review by this Court would be desirable and in the public interest as it is necessary for this Court to resolve the conflict created by the decision of the lower court and resolution of the serious constitutional issues raised in light to Article 66A, Section 19(b).

3. It is necessary to secure uniformity of decisions between existing cases as to whether a Trial Court can allow a case to be considered by a jury on *no evidence at all.*

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MARYLAND RULE 736 IS INAPPLICABLE TO AN APPEAL TAKEN FROM A DISTRICT COURT WHEN A TRIAL DE NOVO IS ELECTED.

At trial, the Appellant presented a Motion to Suppress and a Motion to Dismiss. The State objected pursuant to Rule 736(b) which states:

> "A motion filed pursuant to section a of this Rule shall be filed within 30 days after the earlier of the appearance of counsel of the first appearance of the defendant before the court pursuant to Rule 723 (Appearance — Provision for or Waiver of Counsel), except when discovery is furnished on an issue which is the subject of the motion, then the motion may be filed within five days after the discovery is furnished."

The State's objection was premised upon the contention that the Appellant had failed to file any motions at all and had failed to raise the motion in a timely manner. The Trial Judge denied Appellant the right to argue the Motion to Suppress, a suppression hearing and Motion to Dismiss other than on constitutional issues.

Maryland District Rule 1326(c) states that "an appeal shall be heard on the original papers." Section (d) of that Rule states that "all the original papers filed in the action in lower court, except such papers as the parties may stipulate shall be omitted, shall constitute the record on appeal."

In *Pinkett v. State,* 30 Md. App. 458, 352 A.2d 358 (1976), the Court of Special Appeals of Maryland, in holding that the defendant was required to be tried in the Circuit Court under

the same statement of charges and arrest warrant which had lead to his conviction in the District Court, stated:

> "Md. Rule 1314a, concerning appeals from the District Court, declares: 'Where an appeal is to be heard do novo, it shall be tried according to the rules of procedure governing cases instituted in the appellate court . . .' " At 365.
>
> "If the trial in the Circuit Court is not upon the same charging document as was the trial in the District Court, the trial in the Circuit Court would be an original trial, not a trial anew, afresh, or again, so as to be a trial de novo." At 365.

The Appellant in the case at bar had elected a trial de novo. It is inconsistent to require that the new motions be filed when an appeal is taken although additional written motions were filed by Appellant during the trial in the Criminal Court.

The trial record from the District Court clearly establishes that Appellant, through counsel, presented a Motion to Suppress and Motion to Dismiss despite the State's conflicting contention that no such motions were ever filed by the Appellant, and, upon learning the erroneous nature of that contention, that the motions were not timely filed.

The Appellant contends that it has complied with the "spirit" of Rule 736, et seq., by the renewal of its motions before the Criminal Court when the appeal was taken. The State's contention that the motions were not timely made is contrary to the principles of fairness and equity to which the Appellant is entitled. Rule 736b requires that motions be filed "within 30 days after the earlier of appearance of counsel or the first appearance of the defendant

before the court pursuant to Rule 723 . . ." in the instant case, the earlier proposition is the first appearance of the defendant in the District Court *approximately two years prior* to the time of the appeal to the Criminal Court. Under this construction, it is impossible for the Appellant to file motions under Rule 736b when an appeal has been taken.

Therefore, Appellant respectfully contends that the original motions filed in the District Court proceedings and the renewed motions submitted to the Criminal Court are an integral part of the "original papers" which constitutes the appeal, and that the legal issues raised therein must be considered by the Criminal Court which is the appellate Court in the instant case. Appellant has complied with the "spirit" of Rule 736, et seq., if it is applicable to a trial de novo on appeal from the District Court. Therefore, the lower court's refusal to allow a Motion to Dismiss from being argued, a suppression hearing and argument on the Motion to Suppress was an abuse of discretion and a denial of due process and equal protection of the law.

THE COURT'S REFUSAL TO GRANT APPELLANT'S MOTIONS FOR JUDGMENTS OF ACQUITTAL WAS REVERSIBLE ERROR AND A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN NO EVIDENCE WAS OFFERED TO THE JURY TO SUPPORT A CONVICTION.

The Statements of Charges issued in the case at bar charge violations of Md. Ann. Code 66A Section 19(b) which states:

> (b) any person who shall sell, lease, lend, exhibit or use any film without having first secured approval thereof and a license therefor in accordance with the procedures set forth in subsection (a) above, shall be guilty of a misdemeanor and upon conviction summarily before a court, shall be sentenced to pay a fine of not less than fifty ($50.00) dollars, nor more than one hundred ($100.00) dollars, or to imprisonment for not more than hirty (30) days, or to be both fined and imprisoned in the discretion of the Court."

Clearly, from the face of the statute, a necessary element to be established is that a film was sold, leased, lent or *exhibited* (emphasis supplied); and that the film was not submitted for approval to the Maryland State Board of Censors. The Statements of Charges issued by the police officers specifically charged the Appellant with the "exhibition" of film which failed to display the approval seal of the "Board." Therefore, there is no issue as to the sale, lease or lend of film under §19(b); only *exhibition* was charged as a violation of the statute.

Md. Ann. Code Article 66A, §2, specifies that:

> "It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors . . ."

Section 2 clearly places the responsibility and the obligation of the submission of film to the Board on the "*exchange, owner or lessee of the film.*" (emphasis supplied).

The Maryland statute is intended to be construed consistently and as a whole. In *Thomas v. State,* 353 A. 2d 256 (1976), the Court of Appeals of Maryland remarked:

> "We have said many times that a hornbook rule of statutory construction is that in ascertaining the intention of the Legislature all parts of a statute are to be read together to find the intention as to any one part and that all parts are to be reconciled and harmonized if possible and that a corollary to that rule is that if there is no clear indication to the contrary and it is reasonably possible, a statute is to be read so that no word, clause, sentence or phrase shall be rendered surplusage, superfluous, meaningless or nugatory. See e.g. Kadan v. Bd. of Supp. of Elections, 273 MD. 406, 415, 329 A. 2d 702 (1974); A.H. Smith Sand and Gravel v. Dep't., 270 Md. 652, 659, 313 A. 2d 820 (1974)."

In *Fowel v. State,* 11 A. 2d 524 (1955), the Court of Appeals of Maryland refused to affirm the appellant's conviction for the violation of the Maryland liquor law for dispensing liquor under proscribed conditions. The Court found that the words "any person" found in the last sentences of several sections of the statute referred exclusively to the "licensee" as defined and used throughout the statute. The Court concluded that:

> "If the Legislature had intended that the words 'any person' used in the last sentences of Sections

> 118 and 93, supra, meant any clerks, agents, employees and servants of the licensee, it could have inserted such words in the statute." *Fowel v. State, supra,* at 526.

Appellant contends that under the doctrine of *Thomas, supra,* and *Fowel, supra,* the words "any person" as used in Section 19(b) refers exclusively to the "exchange, owner or lessee" of the film as established in Section 2 of the Article. The statutory language of Section 19(b); "any person who shall sell, lease, lend exhibit or use any film *without having first secured approval thereof . . .*" (emphasis added) restricts the construction of the words "any person" to those specifically enumerated in Section 2; i.e. the "exchange, owner or lessee" as these only are responsible for the submission of the film to the Board.

In the case at bar, the State has failed to offer evidence which would establish that the Appellant is the exchange, owner or lessee" of the films in question. The Appellant further contends that absent such a determination, as a matter of law, the Appellant cannot be prosecuted for the violation of Md. Ann. Code Art. 66A §19(b) and therefore that any conviction is a denial of due process and equal protection of the law under the *Fifth and Fourteenth Amendments* of the *Constitution of the United States.*

This proposition was supported in *Harrington v. State,* 17 Md. App. 157 (1973) in which the Court of Appeals for Maryland reversed a Md. Ann. Code Art. 66A §2 conviction on the ground that is was never established that "Harrington, either individually or in a corporation capacity, was the 'exchange, owner or lessee' of the film that was exhibited in violation of Section 2." at 165.

In the case at bar, the State has, at best, only inferred that the Appellant is the "exchange, owner, or lessee" of the film

seized. This unsupported inference is insufficient to support a conviction. In *Davidson v. Miller,* 276 Md. 54, 344 A. 2d 422 (1975), the Court of Appeals for Maryland stated, in references drawn from evidence:

> "in matters of proof, neither the Courts nor the juries are justified in inferring from mere possibilities the existence of facts, and they cannot make mere conjecture or speculation the foundation of their verdicts." at 427.

Citing from *Craig v. State,* 14 Md. App. 515, 287 A. 2d 300 (1971), the *Harrington* Court, *supra,* stated:

> "We think that the finger of suspicion may well point toward the appellant, but suspicion is not the basis upon which a conviction may be predicated. There must be evidence which, if believed, either shows directly or supports a rational inference of the facts to be proved, from which the court could fairly be convinced, beyond a reasonable doubt, of the defendant's guilt."

In the case at bar, the Appellant contends that because no evidence was presented to establish a legal link between it and the films seized, there is no rational inference which can be drawn to establish guilt beyond a reasonable doubt.

The second major contention of the Appellant is that, as a matter of law, scienter must be proven by the State beyond a reasonable doubt that the Appellant knew the films had not been submitted to the Maryland State Board of Censors and did not bear the required seal.

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In *Star v. Preller,* 352 F. Supp. 530 (1972), the United States District Court for Maryland held that in a Md. Ann. Code Art. 66A, §19(b) prosecution, due to the *First Amendment* context, "the state cannot eliminate the element of scienter and impose strict liability in a criminal prosecution." The Court went on to state:

> "Thus, while we have been unable to find a reported Maryland decision on this issue, it is clear that defendant would be able to raise the defense of a lack of scienter in a criminal prosecution under §19(b), and that the State would have to prove this element in order to sustain a conviction." Supra at 539.

The Appellants have raised the defense of lack of scienter and that state has failed to offer any rebuttal evidence on this issue. Under the doctrine of *Star, supra,* the State has failed to meet its burden of proof and the conviction should be reversed.

The Appellant's third contention is that the State has failed to offer any evidence, circumstantial or otherwise, to establish that, as to approximately 147 films, there was ever an exhibition, an essential element of the offense. There was no evidence or testimony presented at trial to establish or infer that an *exhibition* of these films occurred. The testimony at trial reveals that the police viewed only three of the films and that during the seizure of the films, the police noticed the red occupancy lights on approximately two or three projection booths. At best, there in an inference that an exhibition occurred in the booths in which the red lights were lit. No direct evidence as to an exhibition of any other film was presented at trial. Therefore, the evidence, direct and circumstantial, indicates that only six or seven films were or may have been exhibited. The Appellant was charged

with exhibition and the majority of the films seized, approximately 147, for which the Appellant was convicted of exhibiting in violation of Md. Ann. Code Art. 66A, §19(b), were never established as having been *exhibited* (emphasis supplied). The total lack of evidence as to the *exhibition* (emphasis added) of these films indicates that proof as to the *exhibition* (emphasis added) beyond a reasonable doubt is nonexistent.

The State is merely inferring that film was in each and every projector. The State has assumed that film was in each projector; that each coin-operated projection system was in operational mechanical order; and that a customer, at some point in time, viewed at least a portion of each of these 147 films. At trial, no evidence was proffered by the State to support or prove these assumptions.

The law is well established in Maryland that an Appellate Court may review the sufficiency of evidence which was submitted to the jury in a criminal prosecution when a Motion to Judgment of Acquittal is made pursuant to Maryland Rule 755. The Maryland Court of Special Appeals and the Court of Appeals have consistently held that:

> "On appeal, when reviewing the refusal of the trial judge to grant the motion in a jury case, it is our limited function to determine whether the evidence shows directly or supports a rational inference of the facts to be proved, from which the jury could fairly be convinced, beyond a reasonable doubt (of the defendant's guilt of the offense charged). Vuitch v. State, 10 Md. App. 389, 271 A. 2d 371 at 375 (1971); See also, Cranford v. State, 36 Md.

App. 393, 373 A. 2d 984; State v. Devers, 260 Md. 360, 272 A. 2d 794 (1971). Spease v. State, 21 Md. App. 269, 319 A. 2d 560 (1974)."

In *State v. Devers,* 260 Md. 360, 272 A. 2d 794 (1971), the Court of Special Appeals stated:

> "When a motion for judgment of acquittal is made in a jury case, it is the function of the lower court to determine whether or not the evidence before it is sufficient in law to sustain a conviction. If it determines that it is, it should deny the motion and submit the case to the jury; if it determines that it is not, it should grant the motion and the case does not reach the jury. It is the function of this Court when the question is properly before it, to determine whether the lower court erred in denying a motion for judgment of acquittal. The test to be applied is whether the evidence shows directly or supports a rational inference of the facts to be proved, from which the jury could fairly be convinced, beyond a reasonable doubt, of the defendant's guilt of the offense charged. If there was such evidence there would be no error in denial of the motion; if there was no such evidence, denial of the motion would be reversible error. * * *" Webster v. State, 9 Md. App. 366, 368, 264 A. 2d 291, 292.

Appellant contends that reversible error has occurred in the case at bar, since *no* evidence was proferred as to the actual exhibition of 147 film.

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The cases dealing with this issue consistently hold that *some* evidence must be presented to support a rational inference of the facts to be proved. See *Hines v. State,* 34 Md. App. 612, 368 A. 2d 509 (1977); *Von Lusch v. State,* 31 Md. App. 271, 356 A. 2d 277; *Vuitch v. State,* 10 Md. App. 389, 271 A. 2d 371 (1971); *Spease v. State,* 21 Md. App. 269, 319 A. 2d 560 (1974); *State v. Devers,* 260 Md. 360, 272 A. 2d 794 (1971); *Cranford v. State,* 36 Md. App. 393, 373 A. 2d 984 (1977); *Wright v. State,* 219 Md. 643, 150 A. 2d 733 (1959); *Nichols v. State,* 5 Md. App. 340, 247 A. 2d 722 (1964); *Wilson v. State,* 261 Md. 551, 276 A. 2d 214 (1971).

In each of the above-cited cases, the Appellate Court evaluated the evidence submitted at trial to ascertain whether the evidence met the standards in *Devers* and *Webster, supra.* In each case however, *some* evidence had been submitted at trial to establish the required elements of the offense charged.

The Appellant therefore contends that since the trial records fails to establish *any* evidence at all of the actual exhibition of the films, that an inference as to the occurrence of an exhibition could not be made and that, as a matter of law, this case should not have been presented to the jury without supporting evidence.

The judge therefore committed reversible error in denying Appellant's Motion for a Judgment of Acquittal as a result of which there has been a denial of due process of law under the *Fourteenth Amendment* to the *United States Constitution* and a further denial of equal protection of rights and the *Fifth Amendment* to the *United States Constitution.*

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A DEFENDANT IS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW WHEN A JURY IS ALLOWED TO CONSIDER A CASE WITH NO EVIDENCE AT ALL.

A.

The Appellant was charged and convicted of exhibiting films which failed to display the seal of approval of the Maryland State Board of Censors under Md. Ann. Code Art. 66A, §19(b), *supra.* At trial, the State failed to proffer any evidence whatsoever that an exhibition actually occurred as to approximately 147 of the total 151 films seized. The Appellant argues that the conviction must be reversed as a matter of law, due to the insufficiency of the evidence to support the conviction. The charging documents, the Statements of Charges, specifically charge the Appellant with "exhibition" of film not displaying the required seal of approval. It is clear from the face of the statute and the charging documents, that proof of exhibition (emphasis added) is an essential element to sustain the Appellant's conviction under Section 19(b) of the statute.

In *Benjamin v. State,* 9 Md. App. 373 at 375 (1970), the Court of Special Appeals stated: "It is, of course, well settled that the evidence in a criminal case must not vary from those allegations in the indictment which are essential and material as to the offense charged." *Melia and Shelhorse v. State,* 5 Md. App. 354 at 363 (1978) held that when there is a material variance between the *allegata* and the *probata,* the judgment must be reversed.

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The Appellant contends that such a fatal and material variance between the *allegata* and the *probata* in fact exists in the case at bar and that, therefore, the convictions must be reversed. Appellant further contends that this issue was preserved for appeal by presenting a timely Motion to Judgment of Acquittal as is required by *Jackson v. State,* 10 Md. App. 337 at 349 and *Butina v. State,* 4 Md. App. 312 at 319.

The evidence presented a trial established that the police officers observed no seal of approval from the Maryland State Board of Censors on the three films which they personally viewed. The police further noted that no such seal appeared on any of the film seized.

Md. Ann. Code Art. 66A, §22 establishes that:

> "If any person shall fail to display or exhibit on the screen the approval seal, as issued by the Board, of a film or view, which has been approved, and is convicted summarily in any court of competent jurisdiction, he shall be sentenced to pay a fine of not less than five dollars and not more than ten dollars. All fines and costs shall be paid in accordance with Article 38, §4. (An. Code, 1951, §22; 1939, §22; 1924, §22, 1922, ch. 390, §21; 1972, ch. 181, §58)."

The statute clearly requires that the approval seal from the Censor Board be displayed on all films or view as proof of the submission and approval of the film by the Board.

In the case at bar, the Appellant was charged and convicted of *exhibition* (emphasis added) of film which had not been approved by the Board. The State proferred no evidence of

exhibition (emphasis added) as to approximately 147 films. The police officers established that there were no approval seals displayed on the films they viewed personally.

The Appellant contends that even though the Statements of Charges specifically cite Section 19(b) as the Section of the Article violated, the language on the Statements of Charges are specifically set forth a Section 22 violation. The evidence presented at trial is insufficient to establish a violation of Section 19(b) which requires proof of *exhibition,* but is only sufficient to establish a violation of Section 22, which requires only the failure to display the Board approval seal on the film.

In *Baker v. State,* 6 Md. App. 148, 250 A. 2d 677 (1969), the Court of Special Appeals stated at 157, 250 A. 2d at 683:

> "When the offense is sufficiently particularized, it is not necessary to specify the exact section of the statute or to set forth the law which is alleged to have been violated. But there must be such specification of language as to bring the charge within the particular portion of the statute on which it is based . . ."

Kirsner v. State, 24 Md. App. 579, 332 A. 2d 708 (1975).

In the case at bar, the charging documents specified that *exhibition* was being charged under Section 19(b) of the Article. This establishes the *allegata.* However, the failure of the State to offer evidence as to the essential element of *exhibition* (emphasis supplied) and the existence of Section 22 of the Article illustrates the fatal variance as to the *probata* establishes a violation of Section 22.

Therefore, there exists a fatal and material variance between the *allegata,* which specifically charges *exhibition* in violation of Md. Ann. Code Art. 66A, §19(b), and the *probata,* which is clearly insufficient to establish the occurrence of the essential element of *exhibition* but which does establish the failure to display the approval seal of the Maryland State Board of Censors in violation of Md. Ann. Code Art. 66A, §22.

The result of the Appellant's conviction is, therefore, a denial of due process under the *Fourteenth Amendment* to the *Constitution of the United States.* Under the theories of jurisprudence of *Benjamin, supra* and *Melia, supra,* Appellant is entitled to a reversal of the conviction.

B.

In the alternative, the Appellant contends that the Statements of Charges charge violations of Md. Ann. Code 66A, §22, notwithstanding the reference on the face of the charging documents to Section 19(b) of the Article.

In *Mason v. State,* 12 Md. App. 655, 280 A. 2d 753 (1971), the Court of Special Appeals of Maryland stated:

> "It is well-settled that an indictment is sufficient if it informs the person charged of the accusation against him as required by Article 21 of the Maryland Declaration of Rights, and if the charge is made with sufficient definiteness to enable him to prepare his defense and to prevent the accused from being charged again with the same offense in a future prosecution. Lynch v. State, 2 Md. App. 546, 236 A. 2d 45, certiorari denied in Lynch v. State, 393 U.S. 915, 89 S. Ct. 236, 21 L. Ed.

2d 200; Reagan v. State, 4 Md. App. 590, 214 A. 2d 623; Presley v. State, 6 Md. App. 419, 251 A. 2d 622; Boddie v. State, 6 Md. App. 523, 232 A. 2d 290; and Ward v. State, 9 Md. App. 583, 267 A. 2d 255." At 767.

The Maryland Court of Special Appeals in the *Baker* case, *supra,* stated as follows:

> "(An) Indictment charging an offense denounced and defined by statute should be as fully descriptive of the offense as is the language of the statute, and should allege every substantial element of an offense as defined by statute without material diversion or departure from fair intendment of terms of statute and with reasonable particularity of time, place and circumstances."

The Supreme Court of the United States in the case of *Hamling v. State,* 418 U.S. 87 (1974), speaking to a dialouge as to the sufficiency of the indictment stated as follows:

> "Our prior cases indicate that an indictment is sufficient if it, first, *contains the elements of the offense charged* and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecution for the same offense. Hagner v. United States, 285 U.S. 427 (1932); United States v. Debrow, 346 U.S. 374 (1953). It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully

> directly and expressly, without an uncertainty or ambiguity, set forth *all the elements* necessary to constitute the offense intended to be punished.' *United States v. Carll,* 105 U.S. 611, 612 (1882). 'Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as well inform the accused of the specific offense, coming under general description with which he is charged.' United States v. Hess, 124 U.S. 483, 487 (1888)."

The Appellant contends that the Statement of Charges are insufficiently vague and do not conform to the requirements of *Mason, supra* and *Hamling, supra,* which hold that the language appearing on the face of the charging document is controlling and is not cured by a reference to a specific statute or article.

The Statements of Charges contain the following language stamped in ink across their faces:

> "_____ DID EXHIBIT MOTION PICTURE FILM _____ DID HIRE TO THE PUBLIC ON THE PREMISES OF _____ WITHOUT SHOWING PROPER APPROVAL OR A STATEMENT OF LICENSE."

The Statements of Charges also specifically refer to the violation of "Ann. Code of Md. Art. 66A Sec. 19B."

The Appellant argues that it was not put on notice as to the nature of the charges against it. The wording appearing in the stamped violations, as cited above, more closely, although not

exactly, follows the statutory language contained in Md. Ann. Code Art. 66A Sec. 22 than that contained in Section 19(b).

The State attempted to prosecute the Appellant under Section 19(b) of the Article but failed to produce evidence relating to the *exhibition* (emphasis supplied) of at least 147 of the seized film, an essential element of the violation charged.

Under the doctrines established in *Mason, supra,* and *Hamling, supra,* the language contained on the face of the charging document is controlling thereby indicating that the violation charged against the Appellant was under Section 22. The State proceeded to prosecute under Section 19(b), thereby creating a fatal variance between the allegata and the probata, based upon the evidence presented at trial which failed to support a violation of Md. Ann. Code 66A Section 19(b), but would have supported a violation of Section 22 of the Article which did not require proof of exhibition.

Therefore, under *Melia, supra,* the existence of a material and fatal variance between the *allegata* and the *probata* entitles Appellant to a reversal of the conviction, as the conviction is violative of due process and equal protection under the *United States Constitution.*

Petition

THE COURT'S REFUSAL TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL WAS AN ABUSE OF DISCRETION AND A DENIAL OF DUE PROCESS AND THE RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Appellant contends that the Trial Judge abused his discretion in refusing to grant a new trial pursuant to Maryland Rule 770. The Appellant filed a written Motion for New Trial in a timely manner on the 19th day of August, 1981, following the return of eight separate counts in support of the contention that a new trial should be granted. The Motion was denied on the 10th day of September, 1981 by Judge Baylor.

It is well established in Maryland Law that the matter of granting a new trial is discretionary with the trial judge. See *State v. Devers,* 260 Md. 360, 272 A. 2d 794 (1971). It is also well established that the denial of a new trial is not reviewable absent an abuse of discretion. See *White v. State,* 17 Md. App. 58, 200 A. 2d 873 (1973); *Burett v. State,* 21 Md. App. 438, 319 A. 2d 845 (1974); *Walker v. State,* 21 Md. App. 666, 321 A. 2d 170 (1974).

In *State v. Devers, supra,* the Court of Appeals for Maryland enumerated the principle grounds for granting a new trial. The Court stated:

> "The principle grounds for granting a new trial are, that the verdict was contrary to the evidence; newly discovered evidence; accident and surprise; misconduct of jurors . . ." At 801.

Petition

Count One of the Appellant's Motion For New Trial states the reason for the Motion was "because the verdict is against the evidence." The Second through Fifth counts also pertain directly to evidentuary matters sufficient to support the granting of a Motion for New Trial on the general grounds that the *"verdict was contrary to the evidence."* (emphasis supplied) The Appellant was charged with *exhibition* (emphasis supplied) under Md. Ann. Code Art. 66A, §19(b). The State failed to present *any* evidence, circumstantial or otherwise, to establish that an exhibition actually occurred with respect to approximately 147 of the 151 films seized. The Statements of Charges specified that the violation of the statutory provision was due to *exhibition* (emphasis added) and the statute clearly requires that *exhibition* (emphasis added) be proved as an essential element of the statutory violation. The State's failure to proffer evidence as to the *exhibition* (emphasis added) renders the Appellant's conviction of exhibiting 151 film in violation of Md. Ann. Code Art. 66A, §19(b) "contrary to the evidence", and under the principals of *Devers, supra* entitled Appellant to a new trial.

The Appellant further contends that the injection of the issue of obscenity, as set forth in Count Seven of Appellant's Motion For New Trial, by the State's witness at trial, constituted "surprise" under the principles of *Devers, supra.*

Md. Ann. Code Art. 66A, §19(b) is not an obscenity violation. The statute involves the *exhibition* (emphasis added) of a motion picture without first submitting the film to the Maryland State Board of Censors for approval. Despite the conflict and contradiction raised by the Appellant in other arguments contained in this Petition as to the specific nature of violations charged, it is manifestly clear that obscenity was not among the violations possibly being charged. Therefore, the Appellant was not put on notice as to the necessity to defend against a possible violation

of obscenity law and was unprepared at trial to adequately confront the issue. This constituted "surprise" in its most common sense.

Therefore, the Appellant contends that Count Seven sufficiently raised the issue of "surprise" and is an adequate ground to support the granting of the Motion For New Trial. See *Devers, supra.*

The manifest evidentiary deficiences and the presence of "surprise" indicate that the Trial Judge abused his discretion in refusing to grant the Appellant's Motion For New Trial; and for the reasons cited above, the Motion should have, in the interest of justice, been granted.

In addition, the Appellant moved for a mistrial when the issue of obscenity was injected into the trial. This Motion was denied. Appellant contends that the denial was an abuse of the Trial Court's discretion resulting in a denial of due process and reversible error, as the mistrial should have been granted.

ANSWER TO PETITION FOR WRIT OF CERTIORARI IN THE COURT OF APPEALS OF MARYLAND

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1981

Petition Docket No. 421

400 E. BALTIMORE STREET, INC.

Petitioner

v.

STATE OF MARYLAND

Respondent

Respondent, the State of Maryland, by its attorneys, Stephen H. Sachs, Attorney General of Maryland, and Patricia E. McDonald, Assistant Attorney General, respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the judgment of the Criminal Court of Baltimore in the case of *400 E. Baltimore Street, Inc. v. State of Maryland,* (the trial was held on August 10, 1981 and disposition was held on September 10, 1981), for the reasons that it is not in the public interest.

QUESTIONS PRESENTED

1. Does Maryland Rule 736 apply when a trial *de novo* is elected as an appeal from District Court?

2. Was the evidence sufficient to support the conviction and did the court abuse its discretion in denying the motion for new trial?[1]

3. Did the court abuse its discretion in denying a motion for mistrial?

4. Did the court abuse its discretion in denying a motion for new trial?

STATEMENT OF FACTS

The record in this case has not yet been prepared and the Statement of the Case as presented in the Petition for Writ of Certiorari is merely averments of counsel. Respondent asserts that some of the averments are misleading, if not inaccurate. However, given that Respondent believes there are several reasons why the petition should be denied, Respondent will not present a separate statement of facts but will instead refer to certain facts within the reasons for denying the writ.

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1. Petitioner presented five questions in its Petition for Certiorari, however, Respondent believes that Questions 2 and 3 as framed in the Petition for Certiorari raise the issue as to the sufficiency of the evidence and can be framed as one question.

THE COURT'S REFUSAL TO GRANT APPELLANT'S MOTION FOR MISTRIAL WAS AN ABUSE OF THE COURT'S DISCRETION AND A DENIAL OF DUE PROCESS AND THE RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Appellant, at trial, moved for a mistrial on the theory of misconduct of a juror which might establish possible bias on the part of that juror and might result in tainting the entire panel, thereby denying the right to a fair and impartial jury and a denial of due process.

Appellant's contention is that the misconduct of the juror may have resulted in the in the deprivation of the Appellant's right, under the *Sixth Amendment,* to a fair and impartial trial, and that, therefore, the Court abused its discretion in denying the Appellant's motions for mistrial a new trial.

In *Safeway Trails, Inc. v. Smith,* 222 Md. 206, 159 A. 2d 823 (1960), the Court of Appeals of Maryland stated:

> "The significant and controlling thing is not that the juror violated the instructions of the court and was guilty of an impropriety, but rather whether the conversations were of such a nature that their effect must fairly be held to have been to deprive the injured party of a fair and impartial trial." Rent-A-Car Co. v. Globe & Rutgers Fire Ins. Co. 163 Md. 401, 408, 163 A. 702, 705, 86 A.L.R. 922. The rule followed in that case was that "not every

> trivial act on the part of the juror amounts to such misconduct as requires the withdraw of a juror" and the Court held: "The better rule in such cases would seem to be that such questions be left to the sound discretion of the trial court, whose decision should only be disturbed in those cases where there has been a plain abuse of discretion, resulting in palpable injustice." The case is annotated in 86 A.L.R. 922 with subsequent annotations in 52 A.L.R. 2d 182, 62 A.L.R. 2d 298 and 64 A.L.R. 2d 158." At 829, 830.

Clearly, the failure to acknowledge on vior dire that she knew one of the State's witnesses, the juror in question is not a "trivial act." The majority of cases involving juror misconduct relate to "trivial acts" such as sleeping or inattentive jurors. See *Kasten Construction Co. v. Evans,* 760 Md. 536, 273 A. 2d 90 (1971). *Citing Rent-A-Car v. Globe & Rutgers Fire Ins. Co.,* 163 Md. 401, the Court of Appeals of Maryland in *Patuxent Oil Company Inc. v. County Comm. of Anne Arundel County,* 212 Md. 543, 129 A. 2d 847 (1957) stated:

> "The better rule in such cases would seem to be that such questions be left to the sound discretion of the trial court, whose decision should only be disturbed in those cases where there has been a plain abuse of discretion, resulting in palpable injustice. Especially should this be in cases where there is conflict of evidence as to whether the act constituting the alleged misconduct in fact occurred."

The Appellant here contends that the "conflict of evidence as to whether the act constituting the alleged misconduct in fact

occurred" substantially infers that there was an abuse of discretion which resulted in palpable injustice.

The Appellant was charged and convicted of *exhibition* (emphasis supplied) under Md. Ann. Code Art. 66A §19(b), even though the State proffered *no* evidence to establish that an exhibition actually occurred as to a vast majority of the film seized. The juror, after failing to acknowledge that she knew the State's witness, was seen conversing with the witness in the elevator of the courthouse in the presence of police officers and several other jurors. The effect of this on the other jurors could be detrimental to the interests of the Appellant under the right to a fair and impartial trial of the *Sixth Amendment* to the *United States Constitution*. The Defendant in a criminal case is entitled to the benefit of the doubt, and therefore the Motion for Mistrial and should have, in the interest of justice, been granted.

In *Cornish v. State*, 272 Md. 312, 322 A. 2d 880 at 885 (1974), the Court of Appeals of Maryland, in discussing the appropriateness of granting a mistrial, recited:

> "Finally, the courts have regularly permitted a retrial where the mistrial was caused by the discovery of a juror's possible bias or where something has happened to render doubtful a juror's impartiality. Thompson v. United States, supra; Simmons v. United States, supra . . ."

The principle presented in these cases is clear. A juror's *"possible"* (emphasis supplied) bias or an occurrence which casts *"doubt"* (emphasis supplied) upon impartiality is sufficient to justify the granting of a mistrial.

The Appellant here contends that the "questionable" actions and motives of the juror in question; first failing to acknowledge that she personally knew the State's key witness during the voir dire examination, and then, conversing with her in the presence of several other jury members and police officers is sufficient to demonstrate a *"possible"* bias, which, under the cases cited above, is sufficient to justify the granting of a mistrial.

In a criminal prosecution, the defendant is entitled to every reasonable doubt. Without this benefit, under our system of jurisprudence, the accused has been denied his constitutional right to a fair and impartial trial and due process of law.

CONCLUSION

For the reasons herein stated, the Appellant respectfully requests that this Court issue a Writ of Certiorari to review the decision of the Criminal Court of Baltimore to determine the important constitutional issues created as a result of the decision. It is respectfully suggested that the decision of the Court below is in conflict with *Declaration of Rights for the State of Maryland,* Article 45, and the constitutional guarantees of the *United States Constitution,* and requires this Court's attention in order to maintain uniformity of decisions.

Respectfully submitted,

Burton W. Sandler
Suite 600
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777
Attorney for Appellant

Answer to Petition

IN THE COURT OF APPEALS OF MARYLAND

NO.

September Term, 1981

. 400 E. BALTIMORE STREET INC.

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of October, 1981, a copy of the aforegoing Petition for Writ of Certiorari to the Criminal Court of Baltimore City, was mailed postage prepaid, to Stephen Sachs, Attorney General, Office of the Attorney General, One South Calvert Street, 14th Floor, Baltimore, Maryland 21202.

Burton W. Sandler

Answer to Petition

REASONS FOR DENYING THE WRIT

Maryland Rules of Procedure, Rule 811, requires that a petition for writ of certiorari contain a copy of the judgment in the Circuit Court together with its opinion or charge, if the case has not been decided by the Court of Special Appeals. The rule also requires a concise statement of facts material to the consideration of the questions presented.

The Petition for Certiorari filed in the above-captioned case does not contain a copy of the judgment of the circuit court, together with its opinion or charge nor does it contain a statement of the facts.[2]

Respondent requests that the Petition for Certiorari be denied for failure to conform with Rule 811 in that a copy of the judgment is not attached and for failure to present information which is necessary in the consideration of the petition with accuracy, brevity and clarity.

Moreover, even if this Court were to address the merits of the petition, it is clear that a review of the trial court's decision is neither desirable nor in the public interest.

Maryland Rules of Procedure, Rule 1314a makes it clear that where an appeal is heard *de novo,* the rules of procedure governing cases instituted in the appellate court apply. Here, since the appeal was taken to the criminal court, the provisions of Maryland Rules

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2. The Petition for Certiorari does contain a Statement of the Case which contains averments of counsel as to what occurred in the court below. This statement of the case refers to Appellant. Apparently, the term Appellant should be read to refer to the Petitioner.

of Procedure, Rule 736 clearly applied to the filing of motions and Petitioner's arguments are without merit. Petitioner argues that the evidence was insufficient to sustain the conviction. Except in unusual circumstances, questions as to the sufficiency of the evidence are left to the courts below and are not reviewed by this Court.

In *Wilhelm v. State,* 272 Md. 404 (1974), this Court set forth the standard to be applied in reviewing a denial of a motion for mistrial. Further review of this issue is not necessary. Finally, a decision as to a motion for new trial cannot be reviewed on appeal except under the most compelling and extraordinary circumstances. Maryland Rules of Procedure, Rule 770; *Couser v. State,* 36 Md. App. 485, *aff'd,* 282 Md. 125 (1978). No such compelling circumstances are presented in the instant case.

WHEREFORE, Respondent prays that the petition for certiorari be dismissed, or in the alternative that it be denied for the reasons hereinabove given.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General of
Maryland

s/ Patricia E. McDonald
PATRICIA E. MCDONALD,
Assistant Attorney General
One South Calvert Building
Baltimore, Maryland 21202
659-4000

Attorneys for Respondent

Answer to Petition

I HEREBY CERTIFY that on this 26th day of October, 1981, a copy of the foregoing Answer to Petition for Writ of Certiorari was mailed to Burton W. Sandler, Esquire, Suite 600, 28 Allegheny Avenue, Towson, Maryland 21204.

Patricia E. McDonald
PATRICIA E. MCDONALD,
Assistant Attorney General

ORDER OF THE COURT OF APPEALS OF MARYLAND DATED NOVEMBER 23, 1981

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 421

September Term, 1981

(D.C.A. — Criminal Court of Baltimore — Criminal No. 379-28401-90, 379-22801-63)

400 E. BALTIMORE STREET, INC.

v.

STATE OF MARYLAND

Upon consideration of the petition for a writ of certiorari to the Criminal Court of Baltimore, the answer and response to answer filed thereto, in the above entitled case, it is this 23rd day of November, 1981

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

s/ Robert C. Murphy
Chief Judge

Opposition

Supreme Court, U.S.
FILED
MAR 24 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1376

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

400 E. BALTIMORE STREET, INC.,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN H. SACHS,
Attorney General of Maryland

DEBORAH K. HANDEL,
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Attorneys for Respondent

QUESTIONS PRESENTED

1. Does a state trial court's interpretation of a state rule of procedure necessitated by the mere failure to timely file certain motions generate an issue of constitutional significance?

2. Do questions as to the sufficiency of the evidence rise to the level of constitutional dimension justifying the exercise of this Court's jurisdiction?

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No. 81-1376

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

400 E. BALTIMORE STREET, INC.,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Petitioner was found guilty of violating Maryland Annotated Code, Article 66A, §19(b) by a jury, the Honorable Solomon Baylor presiding on August 14, 1981. The Petitioner was found guilty of 151 separate counts for failing to display the approval of the Board of Censors.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257.

STATE STATUTES

Annotated Code of Maryland, Article 66A, §§19, 2 and 22 (Reproduced in Petition at 2-3).

Annotated Code of Maryland, Article 41, §484 and §486 (Reproduced in Respondent's Appendix at Apx. 7).

Maryland Rules of Procedure, Rules 736, 1314 and 1326 (Reproduced in Respondent's Appendix at Apx. 3-6).

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendments Five and Fourteen. (These provisions are reproduced in the Petition at 4.)

STATEMENT OF THE CASE[1]

Petitioner was charged with violating Annotated Code of Maryland, Article 66A based upon the exhibition of films without Censor Board approval. Petitioner's establishment is located in the well-known adult amusement area of Baltimore City, Maryland called "The Block". Petitioner's enterprise

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[1] A transcript has not been prepared in this case since review by the Court of Appeals was denied. The Statement of the Case presented in the Petition is merely the averments of counsel. The Statement of Facts presented herein was prepared by counsel with the assistance of the Assistant State's Attorney who handled the trial, John Themelas.

consists of both a book store[2] and contains individual, closeted booths in which the patrons may view certain movies. On the outside of each booth, there is a title and a picture display of the movies which are available to be viewed within the booth. The patron enters the booth, pulls a curtain, selects a movie, and deposits a quarter for a specific time period.

The films which are the subject of this conviction were seized from the store pursuant to a search warrant. The police entered the store, noted the titles of the films indicated on each booth, entered the booths, and watched certain movies through their entirety to ascertain whether or not they displayed the Censor Board approval certificate. After establishing that the films which the policemen viewed in their entirety did not have the Censor Board approval, the police officers noted the titles of all the films advertised on the outside of the booths and cross-checked these titles with the Censor Board's master index as to all movies for which approval had been applied or for which approval had been given. From this the police were able to ascertain that no application for approval or approval had been given for films with the titles as displayed on the booths in Petitioner's establishment. A search warrant was then obtained and all the films were seized. There were a total of 151 films.

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[2]See Petition for Certiorari and Brief in Opposition to Petition for Writ of Certiorari, No. 81-902.

After the seizure, the police viewed all of the films and found that none of them displayed the Censor Board approval certificate.

Petitioner was charged in 151 separate counts for violation of the Annotated Code of Maryland, Article 66A, §19(b).[3] The statement of charges was identical for each film except for the change in the title of the films.

After being found guilty in the District Court of Maryland, Petitioner filed a de novo appeal to the Criminal Court of Baltimore City on October 18, 1979. Counsel for Petitioner entered his appearance on December 7, 1979. In September, 1980, Petitioner filed a motion to suppress evidence. On August 14, 1981, Petitioner was found guilty as to each count by a jury with the Honorable Solomon Baylor presiding. Petitioner was fined $50 for each count plus court costs. The Petition for Writ of Certiorari in the Court of Appeals was denied on November 23, 1981.

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[3]A copy of one of the statement of charges referring to three specific films is reproduced in the Respondent's Appendix at Apx. 1. A copy of the docket entries is also attached for this Court's information, Apx. 2. Each docket entry referred to approximately 7 of the counts and were identical except for the specific case number assigned.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED FOR THE REASON THAT THE MERE FAILURE OF COUNSEL TO TIMELY FILE A MOTION TO SUPPRESS AS REQUIRED BY MARYLAND RULES OF PROCEDURE DOES NOT GENERATE AN ISSUE OF CONSTITUTIONAL DIMENSION.

Petitioner admits that it took an appeal de novo from the District Court to the Criminal Court of Baltimore City. Maryland Rules of Procedure, Rule 1314,[4] states that when an appeal is to be heard de novo, it shall be tried according to the rules of procedure governing cases instituted in the appellate court. Maryland Rule of Procedure 736b provides that motions are to be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant. After the filing of a de novo appeal to the Criminal Court of Baltimore City on October 18, 1979, counsel's appearance for the Petitioner was entered in that court on December 7, 1979. The motion to suppress evidence was filed on September 22, 1980. (See docket entries reproduced at Apx. 2). The motions to suppress were filed 10 months after the entry of appearance of counsel for the

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[4]Petitioner consistently refers to Md. District Rule 1326. The thirteen-hundred series of rules are found in the Md. Rules of Procedure, not the Md. District Rules.

Petitioner.[5] Therefore, the trial judge was correct in sustaining the State's objection to the motion to suppress since it was not timely filed.

Maryland Rules of Procedure, Rule 736, has been held to be a constitutional exercise of power by the Maryland Court of Special Appeals. Kohr v. State, 40 Md. App. 92, 97-98 (1978), cert. denied, 283 Md. 735. Rule 736 parallels Rule 12, Federal Rules of Criminal Procedure in that both rules require motions to suppress be filed pretrial and both consider a failure to so timely file the motions to constitute a waiver.

Petitioner relies on Maryland Rules of Procedure, Rule 1326c for the proposition that the motion to suppress filed in the district court case should have been applied in the criminal court case on the de novo appeal. Maryland Rules of Procedure, Rule 1326, is by its own language specifically limited to cases which are to be decided on the record of the lower court, or in cases which could have been heard de novo but which can be determined by the court without an examination of the entire record, or in a trial de novo if the parties agree as to the facts essential to a decision by the court. Thus, by its own terms, Maryland Rules of Procedure,

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[5]Petitioner's assertion that it intended to proceed on the original motion filed in District Court (Pet. at 5) is belied by the record. If in fact it intended to proceed on the motions filed in District Court then there would have been no reason to refile the motions some ten months after taking the de novo appeal and approximately one year prior to trial. See Docket Entries, Apx. 2.

Rule 1326, does not apply in this case since Petitioner elected to be tried de novo. Petitioner's reliance on Maryland Rules of Procedure, Rule 1326c, is misplaced.

The requirement of Rule 736 as applied in this case did not discriminate against the raising of federal claims and was not used to stifle a constitutional claim. Since the decision of the state court rested on the interpretation of the state procedural rule which served the legitimate state interest of promoting judicial economy and efficiency, the failure of Petitioner to abide by this rule prevents this Court's review. See Henry v. Mississippi, 379 U.S. 443 (1965); Wainwright v. Sykes, 433 U.S. 72 (1977).

Moreover, while the failure to file a timely motion under Rule 736 may be excused for good cause shown, the Petitioner offered no evidence to meet this requirement in the court below. Therefore, it follows that Petitioner cannot now show cause for the non-compliance. See Wainwright v. Sykes, supra.[6]

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[6]Petitioner asserts that the time limits of Rule 736 should start from the first appearance of the Petitioner in district court and that under this interpretation, it would be impossible for the Petitioner to file motions under Rule 736 when a de novo appeal has been taken. (Petition at 10). This assertion is frivolous and unsupported by the record. Counsel's appearance for the Petitioner was entered in December of 1979 and Petitioner was arraigned after taking its appeal de novo. The time requirements of Rule 736 started at that time since by operation of Maryland Rule of Procedure 1314, the procedural rules of the appellate court (Cont.)

II.

THE ISSUES AS TO THE SUFFICIENCY OF THE EVIDENCE DO NOT JUSTIFY THE EXERCISE OF THIS COURT'S JURISDICTION.

Petitioner raises several issues as to the sufficiency of the evidence: (a) whether the films were exhibited; (b) whether the State established a nexus between the films and the Petitioner; (c) whether the State established the scienter; and (d) whether there was a variance between the allegata and probata.[7] Petitioner is essentially challenging the trial court's ruling at the time of the motion for judgment of acquittal that the evidence established either directly or inferentially, the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979).

The question as to whether there was sufficient evidence to establish the elements of the crime is a factual inquiry made by the trial court at the close of the State's case. A general principle of this Court's jurisdiction is that questions as to the state court's findings and conclusions of fact will not be reviewed. See Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1953). The two exceptions to this general rule

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are to be applied when an appeal de novo has been taken.

[7]In cases such as this where there has not been a motion to dismiss the indictment, the question as to a variance between the allegata and probata becomes a matter of the sufficiency of the evidence. Green v. State, 23 Md. App. 680, 685 (1974).

is where a federal right has been denied as a result of a finding when there is no evidence to support the finding or where a conclusion of law as to a federal right and a finding of fact are so intertwined that by necessity the court must pass on the conclusions of fact. Fiske v. Kansas, 274 U.S. 380, 385-86 (1927).

Here, the required elements of the crime were established at the trial. The State proved that the Petitioner exhibited the films in that they were offering these films within the booths of Petitioner's premises. The definition of the word exhibit is, "to show or display; to offer...; to produce anything in public, so that it may be taken into possession; ..." Black's Law Dictionary, 5th ed. The testimony of the police officers clearly established that these films were being offered to the public for viewing. The nexus between the Petitioner and the films was shown by the amusement tax receipt issued to Petitioner which is required for all coin operated vendors, the trader's license issued to the Petitioner, and the tangible personal property form which stated that Petitioner was doing business on the premises. The scienter was shown by the trader's licence, the amusement tax receipts and the fact that employees on the premises provided change to be used within the booths. The policemen testified as to the operation of the booths and the fact that they had personally viewed four movies in their entirety. This raised the inference that all the booths were similarly set up. A member of the Censor Board testified that applications for approval or approval had not been

granted for any of the films seized from Petitioner's establishment. The policemen further testified that they personally viewed each film after seizure and that none of the films displayed the Censor Board Seal. Thus, the State established the elements of the crime charged such that a reasonable trier of fact could find Petitioner guilty beyond a reasonable doubt.

The finding of the trial court at the time of the denial of the motion for judgment of acquittal does not justify the exercise of jurisdiction by this Court in that there is sufficient support for its conclusion.

CONCLUSION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari in that there are no special or important reasons justifying the exercise of jurisdiction. The questions presented by Petitioner merely involve factual conclusions and an interpretation of a state procedure rule. The Censor Board is no longer in existence in the State of Maryland,[8] and this crime for which Petitioner was convicted no longer exists. Therefore, there is no public interest in the granting of this Petition. For the foregoing

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[8]The Ann. Code. of Md., Art. 41, §488 et. seq., known as the Sunset Law acted to abolish the Censor Board. Apx. 7.

reasons, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General of Maryland

DEBORAH K. HANDEL,
Chief, Criminal Appeals Division

PATRICIA E. MCDONALD,
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Baltimore, Maryland 21202
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Attorneys for Respondent

Appendix

DISTRICT COURT OF MARYLAND FOR .....

Case No. .....

STATE OF MARYLAND vs. 900 E. Baltimore St. Balto.

Charge: (1) Censor Board Violation

AR..... Code..... GOC....

(2) Censor Board Violation.....

AR..... Code..... GOC....

(3) Censor Board Violation.....

AR..... Code..... GOC....

STATEMENT OF CHARGES (Continued)

Upon the facts contained in the sworn application of ..Det. Sgt. Emanuel Hurst.....

..... of .....C.I.D. Vice Sec.....

It is formally charged that ...900 E. Baltimore St. Balto.....

(1) on or about ....3. Oct.....19.78 at ..900-02 E. Baltimore St.....

.....Balto. Md. did. exhibit. a. motion. picture. film. "Confessions. Hard. Sex".

.for. hire. to. the. public. without. censor. Board. approval.....

.....

.....

.....

In violation of
☐ Common Law of Md. ☐ ..... Ordinance..... ☒ Ann. Code of Md. Art. 66A Sec. 12B

(2) on or about ....3. Oct.....19.78 at ..900-02 E. Baltimore St.....

.....Balto. Md. did. exhibit. a. motion. picture. film. "Deep. Throat". for.....

.hire. to. the. public. without. censor. Board. approval.....

.....

.....

.....

In violation of
☐ Common Law of Md. ☐ ..... Ordinance..... ☒ Ann. Code of Md. Art. 66A Sec. 12B

(3) on or about ....3. Oct.....19.78 at ..900-02 E. Baltimore St.....

.....Balto. Md. did. exhibit. a. motion. picture. film. "Playgirls. Party-

Lady. Fucking". without. censor. Board. approval, to. the. public. for. hire.

.....

.....

.....

In violation of
☐ Common Law of Md. ☐ ..... Ordinance..... ☒ Ann. Code of Md. Art. 66A Sec. 12B

CR 1004 (1/77)

Apx. 1

COURT COPY

CRIMINAL COURT OF BALTIMORE

81-469527

Conviction Case # 37928401 Filed 81

F.&C. NOT PAID

STATE OF MARYLAND

vs.

4100 E. Baltimore St. Apt.

CHARGE: Cruel Viol. (7A)

COURT REPORTER	DATE
J. Savick	10 Aug 81
J. Grant	10 Sept 81

ATTORNEY	DEFENDANT	VOUCHE

John Thanalis
ASST. STATE'S ATTY.

DATE	
10/18/79	Appeal of 6/24/79 filed in Appellate Court
do	#503 Jewelry Cat D
12/7/79	Appearance of Burton W. Sandler, Esq. filed
	NOL PROS Judgment N.G. CRC COC
	VERD TYPE COUNT
	LOC BAIL/SUR PROB
	FINE COSTS
2-22-80	Waiver of MD Rule 746 fnf (Con. 28401)
29 May 80	Transferred - Homicide
4/2/80	MOTION TO SUPPRESS EVIDENCE Id. Con 37928401
do	Def's Motion is Denied. BP. CRC
10 Aug. 81	State's Motion is Denied Def. found and granted. Bay
11 Aug. 81	AS TO CHGS NOL PROS CRC COC
14 Aug 81	AS TO CHGS VERD G TYPE 605-Cocio COUNT
	PROB. - MOTION NOL PROS TYPE - BAIL/SUR Bail Lor.
	FINE COSTS
8-19-81	MOTION FOR NEW TRIAL Id (Con #28401)
10 Sept 81	Motion for new trial heard and denied. Bay J.
do	Judgment Fine $50.00 and Court Cost Bay

APX. 2

Rule 736. Motions Before Trial.

a. *Mandatory Motions.*

A motion asserting one of the following matters shall be filed in conformity with this Rule. Any such matter not raised in accordance with this Rule is waived, unless the court, for good cause shown, orders otherwise:

1. A defect in the institution of the prosecution;

2. A defect in the charging document, other than its failure to show jurisdiction in the court or to charge an offense which defenses can be noticed by the court at any time;

3. An unlawful search, seizure, interception of wire or oral communication, or pretrial identification;

4. An unlawfully obtained admission, statement or confession;

5. A motion for joint or separate trial of defendants or offenses.

b. *Time for Filing Mandatory Motions.*

A motion filed pursuant to section a of this Rule shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 723 (Appearance — Provision for or Waiver of Counsel), except when discovery is furnished on an issue which is the subject of the motion, then the motion may be filed within five days after the discovery is furnished.

c. *Other Motions.*

Any other defense, objection or request capable of determination before trial without trial of the general issue shall be raised by motion filed at any time before trial.

d. *Content of Motions.*

A motion filed pursuant to this Rule shall be in writing unless the court otherwise directs, shall state the grounds upon which it is made, and shall set forth the relief sought. A motion alleging an illegal source of information as the basis for probable cause must be supported by precise and specific factual averments.

e. *Statement of Points and Authorities.*

Every motion shall contain or be accompanied by a statement of points and citation of authorities. A response, if made, shall be filed within 15 days and be accompanied by a statement of points and citation of authorities.

f. *Determination.*

A motion filed pursuant to this Rule, except a motion to dismiss for failure to obtain a speedy trial, shall be determined before trial unless the court otherwise directs in a motion involving subsection a 4 of this Rule. If factual issues are involved in determining the motion, the court shall state its finding on the record.

g. *Effect of Determination of Certain Motions.*

1. Defect in Prosecution or Charging Document.

If the court grants a motion based on a defect in the institution of the prosecution or in the charging document, it may order that the defendant be held in custody or that the conditions of pretrial release continue for a specified time pending the filing of a new charging document.

2. Suppression of Evidence.

If the court grants a motion to suppress evidence, the evidence shall be excluded and shall not be offered by the State at trial, except that suppressed evidence may be used in accordance with law for impeachment purposes. If the court denies a motion to suppress evidence, the ruling is binding at the trial unless the court, in the exercise of its discretion, grants a hearing *de novo* on a renewal of the motion. A pretrial ruling denying the motion to suppress is reviewable on a motion for a new trial or on appeal of a conviction.
(Amended Nov. 16, 1978, effective Jan. 1, 1979.)

Rule 1314. Rules Applicable to Cases Heard De Novo.

a. *Application of Appellate Court Procedure.*

Where an appeal is to be heard *de novo*, it shall be tried according to the rules of procedure governing cases instituted in the appellate court, except the rules relating to the form and sufficiency of the pleadings and except as provided in sections b, c, d and e of this Rule.
(Amended June 30, 1973, effective July 1, 1973; Dec. 17, 1975, effective Jan. 1, 1976; June 16, 1978, effective July 1, 1978.)

b. *Amendment of Charging Document in Appellate Court.*

Maryland Rule 713 (Charging Document — Amendment) is applicable.
(Added June 16, 1978, effective July 1, 1978.)

c. *Waiver of De Novo Trial — Effect.*

If the party appealing fails to appear for trial in the appellate court or moves to abandon his appeal, he waives the right to a trial *de novo*. In the event of such waiver the appellate court shall enter as its judgment the same judgment as was entered in the lower court.

(Added June 30, 1973, effective July 1, 1973; amended June 16, 1978, effective July 1, 1978.)

d. *Motion to Vacate — Reinstatement of Appeal.*

The appellate court may vacate the judgment and reinstate the appeal for good cause shown upon motion filed by the appellant within thirty (30) days of the judgment.
(Added June 30, 1973, effective July 1, 1973; amended June 16, 1978, effective July 1, 1978.)

e. *Small Claim Action.*

Appeals in actions tried under M.D.R. 568 (Small Claim) shall be tried *de novo* in an informal manner without the court being bound by technical rules of procedure or evidence, except those relating to privileged communications, and shall be decided so as to do substantial justice between the parties, according to substantive law.
(Added Dec. 17, 1975, effective Apr. 1, 1976; amended June 16, 1978, effective July 1, 1978.)

Rule 1226. Record on Appeal.

a. *Statement of Case in Lieu of Pleadings and Evidence.*

When the questions presented by an appeal in cases to be decided on the record of the lower court or in cases which could be heard de novo can be determined by the appellate court without an examination of the entire record or a trial de novo, as the case may be, the parties, with the approval of the lower court, may prepare and sign a statement of the case showing how the questions arose and were decided, and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed with the clerk of the lower court shall be treated as superseding, for the purposes of the appeal, all parts of the record other than any judgment from which the appeal is taken and any opinion of the lower court, and, together with such judgment and opinion, shall be certified to the appellate court as the record on appeal.

Committee note.— The purpose of this section is to enable appeals from the District Court to be decided in the most expeditious and economical manner and it is hoped that the "Statement of Case" procedure will be used in all cases where feasible.

b. *Not to Be Printed.*

The record on appeal shall not be printed.

c. *Heard on Original Papers.*

Except as provided in sections a and e of this Rule, an appeal shall be heard on the original papers. The term "original papers" includes exhibits and, in appeals to be decided on the record of the lower court, the transcript of the testimony.

Cross reference. — As to disposition of exhibits in the lower court see M.D.R. 4 (Recording of Proceedings) of the District Court Rules.

d. *Contents of Record.*

1. Original Papers.

Unless otherwise ordered by the lower court pursuant to section e of this Rule, all the original papers filed in the action in the lower court, except such papers as the parties may stipulate shall be omitted, shall constitute the record on appeal. The clerk of the lower court shall append his certificate identifying such papers with reasonable definiteness.

2. Transcript of Testimony.

In appeals to be decided on the record of the lower court, unless a copy of the transcript of testimony is already on file, the appellant shall promptly file with the clerk of the lower court for inclusion in the record a transcript of all the testimony, and shall also promptly serve a copy of such transcript upon the appellee. Instead of serving and filing a transcript of the testimony, the parties by written stipulation filed with the clerk of the lower court may, or upon order of the lower court shall file with the clerk of the lower court for inclusion in the record only such part of the transcript as the parties or the lower court may deem necessary for the appeal.

3. Docket Entries; Copies for Counsel; Statement of Costs.

With the record transmitted to the appellate court, the clerk of the lower court shall transmit a copy, certified by him, of the relevant docket entries in the lower court, and shall furnish copies of said docket entries to counsel for each of the parties. He shall likewise transmit a statement of the cost of making up and certifying the record, and of the amount of the costs taxed against the parties, respectively, to the time the order for appeal is filed, including the cost of the transcript of the testimony if part of the record and a copy, if any, thereof for each of the parties.

e. *Transcript Instead of Original Papers When Lower Court So Orders.*

If the lower court is of the opinion that it is necessary that the original papers in the action be kept in the lower court pending the appeal for use in the trial of other litigation or for other valid reason, it may sign an order to that effect, and thereupon it shall be the duty of the clerk of the lower court to transmit to the clerk of the appellate court a certified copy of the original papers which would otherwise have been transmitted to the appellate court in accordance with the provisions of section d of this Rule.

Excerpts from Ann. Code of Md.

Article 41, §484 et. seq.

REGULATORY PROGRAMS EVALUATION ACT OF 1978

§ 484. Public policy; purposes of subtitle.

It is essential to the maintenance of a healthy State economy and a government that has the confidence of its citizens that the State establish a system of periodic legislative review of State regulatory and licensing activities. This review of executive branch performance is consistent with other activities and goals of the General Assembly. The purpose of this review is to determine which regulatory functions are necessary to serve the public interest and to make regulatory boards accountable and responsive to the public interest in carrying out those necessary functions. The purpose of this subtitle is to ensure that this periodic review of State regulatory and licensing activities takes place by establishing statutory deadlines for legislative evaluation and legislative action. (1978, ch. 808, § 1.)

§ 486. Evaluation schedule.

(a) The following boards and related statutes and regulations shall be evaluated by July 1, 1980:

(5) Maryland State Board of Censors (Art. 66A, § 3);